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No. 80-1894

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

SUPPLEMENTAL BRIEF FOR APPELLANT

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THE RECENT ENACTMENT OF 28 U.S.C. §1738A DOES NOT MAKE THE APPEAL MOOT

Subsequent to the filing of the Jurisdictional Statement on May 8, 1981, the Appellant became aware of new federal legislation which is relevant to the central issue presented in that statement. Public Law No. 96-611, §8.(a), which became law on December 28, 1980, amended Chapter 115 of Title 28, United States Code "by adding immediately after section 1738 the following new section: ' **§1738A. Full faith and credit given to child custody determinations.**'"

Under the sub-heading "FINDING AND PURPOSES," Congress enumerated the following factors which led it to amend that section of the United States Code:

> "(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, . . . ;
>
> "(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, **are often inconsistent and conflicting**;
>
> "(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment and interstate transportation of children, the

disregard of court orders, excessive relitigation of cases, **obtaining of conflicting orders by the courts of various jurisdictions,** . . . ; and

"(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, ..." Public L. No. 96-611, §7.(a), 94 Stat. 3568-3569 (1980). [Emphasis added.]

A major objective of amending the United States Code was to avoid and eliminate the possibility of future inconsistent and conflicting custody decrees. Due to the fact this is a central issue in the appeal, one might conclude that this legislation has now made the appeal moot. On the contrary, the reverse is true. In this Supplemental Brief the Appellant will argue that the objective of the legislation cannot be achieved unless this Court rules on the federal question presented in the Jurisdictional Statement.

A. A requirement that full faith and credit be given a child custody determination does not deter a second forum state from modifying a foreign custody decree.

Article IV, §1 of the Constitution of the United States requires each State to grant full faith and credit to the judicial proceedings of another State. Courts, however, have held that the Full Faith and Credit Clause of the Constitution is not applicable to custody decrees.

"It is well-established that the Full Faith and Credit Clause of the United States Constitution is not applicable to custody decrees, which are uniformly held to be subject to modification." *Nehra* v. *Uhlar*, 168 N.J. Super. 187, 193, 402 A. 2d 264,

267 (App. Div. 1979).

In *Borys* v. *Borys*, 76 N.J. 103, 120, 386 A. 2d 366, 374 (Sup. Ct. 1978), the Supreme Court of New Jersey endorsed a view "[e]xcepting child custody decrees from full faith and credit." The *Borys* Court, however, recognized that the controversy is academic because "full faith and credit does not preclude modification of a custody decree by the forum state on grounds permitted by the law of the rendering state, *Halvey*, [*Halvey* v. *Halvey*, 330 U.S. 610 (1947).] *supra.*" *Borys*, 76 N.J. at 115, 386 A. 2d at 372.

All states recognize changed circumstances as the basis for modifying a custody decree. Therefore

> " . . . the forum can modify the decree based on a finding that circumstances have changed since the decree was entered.
>
> [T]he term "change in conditions" is sufficiently broad to make it possible for a court to escape what it might otherwise feel to be an obligation to recognize an earlier award * * * through resort to the simple expedient of requiring little evidence of change. [*Strumberg, The Status of Children in the Conflict of Laws*, 8 *U. Chi. L. Rev.* 42, 57 (1940).]" *Borys*, 76 N.J. at 116, 386 A. 2d at 372-373.

The American Law Reports, Annotated also made the following candid observation:

> "Generally where a court of a state is passing upon its own jurisdiction to award custody of a child that is physically present, though domiciled elsewhere, it is likely to be motivated by the doctrine of parens patriae and to proceed to decide for

> itself what is for the best interests of the child, and if there is in existence a valid judgment of another state awarding such custody, **to give at least lip service to the binding effect thereof by limiting the court's consideration of the merits to conditions which have changed since that foreign judgment was rendered** -- all too frequently such changed conditions being found to exist in favor of the local citizen." Dempsey, Custody of Child - Jurisdiction, 4 A.L.R. 2d 15 (1949). [Emphasis added.]

In sum, where a child is present within the jurisdiction of a second forum state, a requirement that full faith and credit be given a child custody determination does not deter the courts of that state from modifying a foreign custody decree. In the event the second forum state exercises personal jurisdiction over the defendant at the modification proceedings, the requirement of full faith and credit merely deprives the court of original jurisdiction of continuing jurisdiction.

B. The jurisdictional requirements of 28 U.S.C. § 1738A do not preclude the existence of two, equally valid, inconsistent and conflicting custody decrees.

The jurisdictional requirements of 28 U.S.C. §1738A are similar, but not identical to those of the Uniform Child Custody Jurisdiction Act. In the event a child resides temporarily in a second forum state for more than six months, that state could lay claim to being the home state of the child. Any controversy regarding which state rightfully exercises jurisdiction is decided by the second forum state. If the modification proceedings in the second forum state are *in personam*, a judgment rendered by that court is *res judicata* and supersedes the original decree.

Following the lead of the Uniform Child Custody Jurisdiction Act, 28 U.S.C. §1738A does not require personal jurisdiction over a nonresident defendant at modification proceedings. Consequently, if the modification of custody proceedings in the second forum state are *in rem*, and that court renders an *ex parte* modification of custody judgment, as in the instant case, the court of original jurisdiction is not required to accord it full faith and credit. *May* v. *Anderson*, 345 U.S. 528 (1953); *Borys*, 76 N.J. at 115, 386 A. 2d at 372.

Despite the efforts of Congress to eliminate inconsistent and conflicting custody decrees, the *in rem* jurisdictional requirements of 28 U.S.C. §1738A at modification of custody proceedings preclude this from occurring. Inconsistent and conflicting custody decrees will continue to exist as long as a second forum state can lawfully modify a foreign custody decree without exercising personal jurisdiction over a nonresident defendant, and the court of original jurisdiction can lawfully deny full faith and credit to an *ex parte* modification of custody judgment rendered by a second forum state not exercising *in personam* jurisdiction. **A definitive ruling on the federal question contained in the Jurisdictional Statement will once and for all resolve this legal dilemma.**

C. Inconsistent and conflicting custody decrees violate the civil and human rights of the minor children and parents caught up in this legal tragedy.

It is highly significant that the Appellee did not file a Motion to Dismiss. In the event this Court denies probable jurisdiction, a stalemate will occur which will pose a serious threat to family stability. It should be

noted that the California Order reaffirming the Joint Custody Order was rendered **after** the New Jersey *ex parte* modification and with full knowledge of the New Jersey proceedings. Consequently, neither custody decree commands greater recognition in jurisdictions outside of California and New Jersey.

Therefore, the minor children become hostages in an interstate jurisdictional dispute. They are virtual prisoners within the State of New Jersey because no law would be violated in the event they are spirited to California while visiting outside the boundaries of New Jersey. Moreover, this conflict of laws has resulted in a total breakdown in the father-children relationship due to the fact that visitation and contact with the children in New Jersey would subject the Appellant to the jurisdiction of that state and the subsequent loss of custodial rights under the California Joint Custody Order.

The continuation of this stalemate is not in the best interests of the minor children or either parent. The non resolution of this dilemma constitutes a violation of human rights by not providing elementary legal protection to the family. Violations of human rights take on a legal and political significance that transcend the boundaries of the nation-state in which they occur.

Dated: June 22, 1981.

Respectfully submitted,

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